



Comptroller General
of the United States

Washington, D.C. 20548

J. Formica

Decision

Matter of: Cincinnati Milacron Marketing Company

File: B-237619

Date: February 27, 1990

Lawrence E. Bustle, Jr., Cincinnati Milacron Marketing Company, for the protester.
Col. Herman A. Peguese, Department of the Air Force, for the agency.
John Formica, Esq., and John Brosnan, Esq., GAO, Office of the General Counsel, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation for high speed blade tip grinders should have been limited to grinders manufactured in the United States or Canada involves an alleged impropriety apparent from the face of the solicitation and is untimely when not filed until after award.
2. Untimely protest will be considered as raising a significant issue where the protest allegation involves the proper interpretation of a congressional restriction on the use of appropriated funds which allegedly has been violated by the procuring agency.
3. Determination as to proper Federal Supply Classification (FSC) code for item being purchased is for the buying agency, and that determination will stand unless it is clearly without a reasonable basis; where an agency might have classified an item under either of two FSC codes, its determination that one of the codes is the more appropriate one will not be disturbed where the record reflects a reasonable basis for the determination.

DECISION

Cincinnati Milacron Marketing Company protests the award of a contract to Butler Newall, Inc., an English firm, under request for proposals (RFP) No. F41650-89-R-0042, issued by the Air Force for high speed blade tip grinders. Cincinnati Milacron contends that the machines were not properly

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classified by the Air Force within the Federal Supply Classification (FSC) as "grinding machines," and because of this misclassification the solicitation failed to require that offerors agree to supply blade tip grinders manufactured in the United States or Canada.

We deny the protest.

The RFP was issued on April 21, 1989, with award to be made to the low-priced technically acceptable offeror. The closing date for receipt of initial proposals was May 23. Two offerors, Butler Newell and Cincinnati Milacron, submitted offers. After best and final offers were requested, Butler Newell was found to be the low technically acceptable offeror and award was made to it on September 15.

Cincinnati Milacron argues that the Air Force misclassified the grinders within the FSC as "Aircraft Maintenance and Repair Shop Special Equipment," rather than as "Grinding Machines." The protester notes that had the blade tip grinders been classified as grinding machines within the FSC, the Air Force would have been limited to purchasing blade tip grinders manufactured in the United States or Canada. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 225.7008, 252.225-7023. Thus, according to the protester, Butler Newell, as an English firm, would have been ineligible for award.

We agree with the Air Force that the protest is untimely as we think that Cincinnati Milacron should have been aware of its basis of protest from the solicitation itself. Solicitations for the classes of machine tools subject to the restriction that they be of United States or Canadian manufacture must contain the "Restriction on Acquisition of Foreign Machine Tools" clause, see DFARS §§ 225.7008, 252.225-7023, which notifies offerors that machine tools supplied must be manufactured in the United States or Canada, and requires offerors to agree to supply such machine tools. The solicitation did not contain any provision requiring that the blade tip grinders be manufactured in the United States or Canada. Further, the solicitation included the national stock number of the required items--4920-01-146-0701--which contains their FSC code, 4920, identifying them as aircraft maintenance and repair shop special equipment. Machines under this code are not subject to the domestic origin requirement.

While the protester argues that it did not have either the technical expertise or any reason to conduct the research needed to conclude that the solicitation was defective until the award was made to a foreign firm, it is our view that it

should have been evident to a reasonably prudent offeror that the solicitation did not categorize the equipment as grinding machines and contained no provision restricting award to domestic firms. Our Bid Protest Regulations require that protests based on alleged improprieties which are apparent from the face of the solicitation be filed with our Office or the procuring agency before the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1989). Here, the closing date for receipt of proposals was May 23. Since Cincinnati Milacron's protest was not filed until after the award was made, it is untimely.

Nonetheless, we think the issue raised by the protester warrants consideration under the significant issue exception to the timeliness rules. See 4 C.F.R. § 21.2(b). The foreign machine tools restriction reflected in the DFARS is imposed by statute, see Department of Defense (DOD) Appropriation Act, 1989, Pub. L. No. 100-463, § 8069, 102 Stat. 2270, 2270-28,^{1/} and in essence the protester's allegation is that the Air Force has circumvented the intent of Congress by misclassifying the grinders. We think this allegation, involving the proper interpretation of a congressional restriction on the use of DOD funds, raises a significant issue. See LTV Aerospace Corp., 55 Comp. Gen. 307 (1975), 75-2 CPD ¶ 203.

The statutory language provides that none of the funds appropriated by the Act "may be used to procure the Federal Supply Classes of machine tools set forth in subsection (b) of this section . . . [unless] manufactured in the United States or Canada." FSC code 3415, Grinding Machines, is included in the statutory listing; code 4920 is not. The protester asserts that the only proper classification for the grinders is under FSC code 3415 because the grinder "is at all times a metal cutting machine tool"; the "function of the machine is that of a grinder which, incidentally, can be utilized for aircraft maintenance." The protester further asserts that where an item is susceptible to being classified under more than one FSC code, the determinative factor should be "the most significant application of that item." In the protester's view, the "most significant application" of the blade tip grinder is as a metal cutting machine, not an aircraft maintenance item.

The Air Force, on the other hand, asserts that the blade tip grinder "is unlike a conventional grinder in that it is a

^{1/} The same restriction appeared in the 1988 DOD Appropriation Act. See Pub. L. No. 100-202, § 101(a), 101 Stat. 1329, 1329-77.

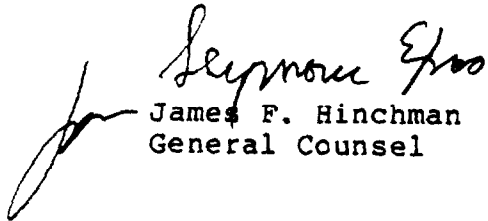
system" consisting of the machine itself, certain controls, specially designed software, "several pieces of fixturing unique to each compressor rotor," a laser gauging system, a dust collection unit, a sound attenuation booth, data, and training. The Air Force states that while it views multi-purpose grinders as properly classified under code 3415, unique purpose grinders used only for aircraft engine compressor rotors are classified as aircraft maintenance/special equipment under code 4920. The Air Force further reports that this machine has been categorized under code 4920 since June 1, 1983.

Most of the equipment and supply items purchased by the federal government are categorized under the FSC system. See generally 41 C.F.R. § 101-30.103-1 (1989). Although for many items there may be no question as to the appropriate classification for those items, both the protester and the Air Force recognize that some items may fit in more than one category. Obviously, it is the buying agencies, utilizing the guidance provided by the General Services Administration and the Defense Logistics Agency, the agencies responsible for maintaining the FSC system, see 41 C.F.R. § 101-30.103-1, that must determine the appropriate categories for items they seek to buy. It is not within our province to overturn such determinations simply because a category other than the one selected might also have been chosen. Rather, we think the agency's decisions must stand unless it clearly appears that there was no reasonable basis for the determination.

Here, while the heart of the system being purchased is a grinding machine, the system itself appears to be considerably more than that and one that is designed for a particular, specialized use in connection with aircraft maintenance. While the Air Force might have concluded that the item could be categorized as a grinding machine under FSC code 3415, we think it clearly could conclude, under these circumstances, that the appropriate classification of the item is as aircraft maintenance/special equipment under code 4920. Moreover, the fact that the item has been so classified since 1983 suggests that the Air Force did not intend to circumvent the intent of Congress when it used that classification for this procurement or that the Congress, in imposing the appropriation restriction for fiscal years 1988 and 1989, intended to reach an item that traditionally had been placed under a FSC code other than those to which it applied the restriction. Obviously, if the Congress wanted to include some or all items categorized under code 4920 among those made subject to the restriction, it could have done so. Accordingly, while we recognize the protester's strong disagreement with what the Air Force has

done here, we find no basis to overturn the Air Forces's decision to classify the blade tip grinders under FSC code 4920 or to conclude that congressional intent is being circumvented.

The protest is denied.

 Seymour E. Hinchman
James F. Hinchman
General Counsel